P. Alex.r Wedderburn &c

DECEMBER 11th, 1761.

To see
15. Feb: 1762.
Adhere

Unto the Right Honourable, The Lords of Council and Session,

THE PETITION OF

ALEXANDER WEDDERBURN of *St. Germans*, Esq; and others, Defenders,

Humbly ſheweth,

THAT Sir *Peter Wedderburn* of *Gosford* intermarried with Dame *Janet Halket* of *Pitfirran*, of which Marriage there was Iſſue both Sons and Daughters.

Of this Date, the ſaid Dame *Janet Halket*, with Conſent of her Huſband, executed a Deed of Tailzie, containing Procuratory for reſigning her Eſtate of *Pitfirran*, in favours, and for new Infeftments to be granted to herſelf and Huſband, and longeſt Liver of them, in Liferent, and to *Peter Wedderburn*, their eldeſt Son, in Fee, and to the Heirs-male of his Body; which failing, to the Daughters or Heirs-female of his Body, *ſucceſſive*, without Diviſion; which failing, to *Charles Wedderburn*, their ſecond Son, and the Heirs male and female of his Body, as aforeſaid; which failing, to *James Wedderburn*, their third Son, and the Heirs male and female of Sept. 9th, 1706.

3

his Body, as aforeſaid; which failing, to any other Son to be procreate betwixt them and the Heirs male and female of his Body, as aforeſaid; which failing, to *Janet*, *Agnes*, and *Chriſtian*, their three Daughters, and to any other Daughter to be procreate betwixt them, and to their Iſſue, male and female, in their Order, and without Diviſion; which failing, to the Heirs male and female to be procreate of the Body of the ſaid Dame *Janet Halket*, of any other Marriage, and the Heirs male and female of their reſpective Bodies, in their Order, and without Diviſion, as aforeſaid; which failing, to the younger Siſters of the ſaid Dame *Janet Halket*, and their Iſſue, male and female, in their Order, and without Diviſion, as aforeſaid; which all failing, to the ſaid Dame *Janet Halket*, her Heirs and Aſſignees whatſoever, with and under the Proviſions, Conditions and Irritancies under written.

1*mo*, That the ſaid *Peter Wedderburn* and haill other Heirs of Tailzie, ſhall be obliged to aſſume and bear the Sirname, Title, Cogniſance, Arms and Coat-armorial of *Halket* of *Pitfirran*; and in caſe the Succeſſion ſhall devolve to Daughters or Heirs-female, the eldeſt ſhall ſucceed without Diviſion; and they and their Huſbands ſo ſucceeding, ſhall be obliged to aſſume and bear the Name and Arms of the Family of *Halket* of *Pitfirran*, as aforeſaid, under an Irritancy of the Right of the Contraveener, and of the Heirs of his or her Body.

2*do*, Whereas, by a Bond of Tailzie, executed by the ſaid Sir *Peter Wedderburn*, of that Date, his Lands and Barony of *Gosford* are provided to the ſaid *Charles Wedderburn*, our ſecond Son, and the Heirs of his Body; which failing, to the other Heirs of Tailzie and Proviſion therein expreſſed, whereby it may happen, that the ſaid Eſtates of *Gosford* and *Pitfirran* may devolve to, and coincide in one and the ſame Perſon; and it being my Intention, and the Intention of my ſaid Huſband, in the reſpective Tailzies of the ſaid Eſtates, to preſerve the Family and Eſtate of *Pitfirran* ſeparate and diſjoined

joined from the Family and Eſtate of *Gosford*, ſo long as there ſhall happen to be more than one Deſcendent of the Bodies of me and my ſaid Huſband, exiſting at the Time of the ſaid Union; therefore it is hereby ſpecially *provided* and *declared*, that, in caſe the ſaids Eſtates ſhall happen to coincide and be united in the Perſon of the ſaid *Charles Wedderburn*, then, and in that caſe, it ſhall be in his Option and Election, either to hold the Eſtate of *Gosford*, and to denude himſelf of the Eſtate of *Pitfirran*, in favours of *James*, his immediate younger Brother, and the other Heirs of Tailzie above written, or otherwiſe it ſhall be lieſome to him to take the Eſtate of *Pitfirran* by virtue of this preſent Tailzie, and to denude himſelf of the Eſtate of *Gosford* in favours of the ſaid *James*, his younger Brother, and the other Heirs ſubſtitute to him by the ſaid Tailzie of *Gosford*, providing always, that he ſhall be holden and obliged to make his foreſaid Election, and to denude, *ut ſupra*, within Year and Day after the Right of Succeſſion ſhall happen to devolve to him, otherwiſe the Right of Succeſſion to the ſaid Eſtate of *Pitfirran* ſhall fall and pertain to the ſaid *James*, his younger Brother, and the Heirs ſubſtitute to him in the ſaid Eſtate.

Providing alſo, " That in caſe the ſaid *Charles* ſhall make " his Election of the Eſtate of *Pitfirren*, within the Space " aforeſaid, then, and in that Caſe, it ſhall not be lieſome " nor lawful to him to burden or affect the Eſtate of *Gosford*, " or his Succeſſor therein, with any Debts or Deeds to be " contracted or done by him, after the Right of Succeſſion " to the Eſtate of *Pitfirren* happens to devolve to him, the " ſaid *James* being always bound and obliged to free the ſaid " *Charles*, and to diſburden the Eſtate of *Pitfirren*, of any " Debts or Deeds contracted or done by the ſaid *Charles*, " during his remaining in the Right of the Eſtate of *Gosford*, " before the Right of Succeſſion to the Eſtate of *Pitfirren*, " be devolved to him, as ſaid is."

The

The like Proviſo is repeated and applied to the Event of both Eſtates uniting in the Perſon of the ſaid *James Wedderburn*, or in the Perſon of any other Son or Daughter, procreated or to be procreated, of the ſaid Lady and her Huſband; and then follows a general Clauſe in theſe Words: " And, moreover, if it ſhall happen the ſaid Eſtates to co- " incide and be united in the Perſon of any of the Children, " Grand-children, or others the Deſcendents of any of the " Heirs of Tailzie above mentioned, procreated or to be " procreated betwixt me and my ſaid Huſband, and that " there ſhall happen to be another Deſcendent of the ſaid " Marriage betwixt me and my ſaid Huſband, in Life, at the " Time of the ſaid Union, in that Caſe, the Perſon ſo ſuc- " ceeding to both the ſaid Eſtates, ſhall, in like Manner, be " holden and obliged to make Election, and to denude in " favours of the next immediate Heir of Tailzie of the E- " ſtate, whereof he or ſhe ſucceeding, as ſaid is, ſhall chooſe " to denude, the ſaid other Deſcendent being of the Mar- " riage betwixt me and my ſaid Huſband, alſo within the " ſaid Space, with Certification, and with and *under the* " *ſpecial Proviſion above written, particularly above preſcribed,* " *in all Points.*"

And, *laſtly*, providing, " Likeas it is hereby further pro- " vided and declared, that it ſhall not be lieſome nor lawful " to the ſaid *Peter Wedderburn*, or any of the remanent Heirs " of Tailzie above written, to do any Fact or Deed what- " ſomever, directly or indirectly, in any ſort, whereby to al- " ter, infringe or innovate this preſent Tailzie, in the Order " of Succeſſion, and under the Conditions and Proviſions a- " bove ſpecified, otherways, not only any ſuch Facts and " Deeds ſhall be *ipſo facto* void and null, without Declarator " for that Effect; but alſo, the Contraveener, and the Heirs " of the Contraveener's Body, ſhall amit, loſe and tyne, " the Lands and Eſtate above written, and the ſame ſhall, " incontinent after the Contravention foreſaid, accreſce, fall

" and

" and pertain to the next immediate Heir, ſubſtitute to the " Contraveener, with and under the Proviſions and Condi- " tions above written, to whom it ſhall be lawful to make up " Titles by Service or Declarator, as accords of the Law, " *and that always* but Prejudice to the ſaid *Peter Wedderburn*, " and haill remanent Heirs of Tailzie above written, in the " Order of Succeſſion above expreſſed, of the *Fee, full Right* " *and Property of the ſaids Lands and Eſtate above written,* " *whereby it is and ſhall be lawful to them, to ſell and annalzie* " *the ſame, or any Part thereof, for onerous Cauſes, and there-* " *upon to contract and on-take Debts, Wadſets, Infeftments of* " *Annualrents, or other real Rights or Securities to grant,* " *and all other Facts and Deeds thereanent to do, uſe, and ex-* " *erce at their Pleaſure, providing the ſame be not done gratui-* " *touſly, or of Deſign and Intention to fruſtrate this preſent* " *Tailzie and Deſtination, in the Order of Succeſſion above writ-* " *ten, or the Conditions above ſpecified, adjected thereto, in any* " *ſort. Hereby declaring*, that it ſhall be lawful to the next " immediate Heir-ſubſtitute, to impugn, quarrel or reduce, " any ſuch Deeds, made *gratuitouſly, or of deſign to fruſtrate,* " as ſaid is, which being ſo found and declared, the ſame " ſhall infer a direct Contravention againſt the Granter, who, " and the Heirs of his Body, ſhall thereby tyne the Right to " the ſaid Lands and Eſtate, and the ſame ſhall, incontinent " thereafter, accreſce and reſolve in Manner above provided, " in all Points, Acts, Inſtruments and Documents in the Pre- " miſſes, to aſk, liſt and receive, *&c.*

Upon this Tailzie, Charter and Infeftment followed in the Year 1713.

Of the ſame Date with the above Tailzie of the Lands of *Pitfirren*, Sir *Peter Wedderburn*, then called Sir *Peter Halket*, executed a Tailzie of his Eſtate of *Gosford*, in favour of himſelf in Liferent, and *Charles Wedderburn* his ſecond Son in Fee, and the Heirs-male of his Body; whom failing, to the Daughters or Heirs-female of his Body, without Diviſion; whom Sept. 9, 1706.

ſailing, to *James Wedderburn* his third lawful Son, and the Heirs-male of his Body; whom failing, to the Daughters, or Heirs-female of his Body, in their Order, without Diviſion; whom ſailing, to the other Iſſue procreated or to be procreated betwixt him and the ſaid Dame *Janet Halket* his Lady, in the ſame Order as in the Tailzie of *Pitfirren*; whom failing, to his eldeſt Son *Peter*, and his Iſſue, male and female, in their Order, without Diviſion; whom all failing, to his own collateral Heirs, in the Order therein mentioned. And this Tailzie contains the ſame Clauſes as in the Tailzie of *Pitfirren*, to provide for the Separation of the two Eſtates, in caſe they ſhould be united in the Perſon of *Charles*, or any of Sir *Peter*'s Children or Grand-children, or other Heirs of Tailzie. It alſo contains a Limitation againſt altering the Courſe of Succeſſion, with irritant and reſolutive Clauſes, of the ſame Tenor with thoſe above recited, from the Tailzie of *Pitfirren*. Upon this Tailzie alſo, Charter and Infeftment was expede, and the Eſtate was taken by *Charles*, the ſecond Son.

Peter Halket, the eldeſt Son of Sir *Peter* and Dame *Janet Halket*, intermarried with Lady *Emilia Stewart*; and by a poſt-
Feb. 25, 1738. nuptial Contract of Marriage, of this Date, entered into betwixt him and his Father, upon the one Part, and Lady *Emilia* and her Father, the Earl of *Moray*, upon the other Part, the ſaid *Peter Halket*, with Conſent of his Father, granted Procuratory for reſigning the Eſtate of *Pitfirren*, "in favour "of himſelf, and the Heirs-male already procreated or to be "procreated betwixt him and the ſaid Lady *Emilia Stewart*, "and the Heirs whatſoever of their Bodies; whom failing, "to the Heirs-male of the ſaid *Peter Halket* his Body, in any "ſubſequent Marriage, and the Heirs-male of their Bodies; "whom failing, to the Daughters or Heirs-female of his pre-"ſent, or any after Marriage, in their Order, and without "Diviſion; whom failing, to the other Heirs of Tailzie ap-"pointed to ſucceed by the above Tailzie of *Pitfirren*, 1706," under

under the Proviſions, Conditions, Limitations, and Reſtrictions therein contained.

From comparing this Contract of Marriage with the Tailzie of *Pitfirren*, your Lordſhips will obſerve a Difference in the Order of Succeſſion; for, by the Tailzie, the Eſtate is provided, *to* Peter, *and the Heirs-male lawfully to be procreated of his Body; which failing, to the Daughters or Heirs-female to be procreated of his Body:* So that all the Sons of *Peter* were called to the Succeſſion ſucceſſively, in Preference to the Daughters of their elder Brothers; and the Daughters of *Peter*'s own Body, are called in Preference to the Daughters of any of his Sons; whereas, by the Contract of Marriage 1738, the Succeſſion is provided to each of *Peter*'s Sons, and the Heirs whatſoever of their Bodies, in their Order, agreeable to the legal Succeſſion, but contrary to the Succeſſion eſtabliſhed in the Tailzie 1706.

Of this Marriage between the ſaid *Peter Halket*, afterwards Sir *Peter Halket*, there were three Sons, *Peter*, *Francis*, and *James*. *Peter* was born before the Date of the poſtnuptial Contract of Marriage, and from his earlieſt Years diſcovered many Symptoms of Weakneſs of Mind and Capacity; but as he was an Infant when the above Contract of Marriage was entered into by his Father and Mother, it was natural for them to entertain Hopes, that, as he advanced in Years, his Underſtanding and Faculties might ripen, and therefore they were willing to give him the firſt Place in the Succeſſion, according to the Proviſion in the Tailzie 1706, hoping, that, when he advanced to Years, he might appear not altogether unworthy of it. But their fond Expectations were ſoon diſappointed; for, as he advanced in Years, the ſmall Glimmerings of Reaſon, which had appeared in his Infant-ſtate diſappeared, and were ſucceeded by all the melancholy Appearances of Idiocy.

Sir *Peter* thought it his Duty to delay making any Alteration in the Settlement of his Eſtate, till his eldeſt Son ſhould

arrive

arrive to the full Age and Stature of a Man, and then, finding no Hopes, or human Probability of his Reconvaleſcence, he thought himſelf called upon, by the Providence of God, and the Duty which he owed to his Family, to prevent his Succeſſion from devolving upon a Son, altogether incapable of enjoying it.

14 Octob. 1751. For this Purpoſe, in the Year 1751, he executed a Procutory of Reſignation, upon the Narrative of weighty Cauſes and Conſiderations, for reſigning his Eſtate of *Pitfirren*, for new Infeftments " to himſelf; and, failing him by Deceaſe, " to *Fracis Halket*, his ſecond Son, and the Heirs whatſoever " of his Body, without Diviſion; whom failing, to *James* " *Halket*, his third Son, and the Heirs whatſoever of his Bo- " dy, without Diviſion; whom failing, to any other Sons or " Heirs-male, to be procreate betwixt him and Lady *Emilia* " *Halket*, and the Heirs of their Bodies, without Diviſion; " whom failing, to the Heirs-male of his Body in any ſubſe- " quent Marriage, and the Heirs whatſoever of their Bodies, " without Diviſion; whom failing, to his Daughters of that " Marriage, and the Heirs of their Bodies, without Diviſion; " whom failing, to his Daughters of any ſubſequent Marriage, " and the Heirs of their Bodies, without Diviſion; whom all " failing, to the other Heirs of Tailzie, Subſtitutes and Suc- " ceſſors, deſtinate and appointed to ſucceed to the ſaid Lands " and Eſtate, by the Bond and Deed of Tailzie, executed by " the deceaſed Dame *Jean Halket*, his Mother, with Conſent " of his Father, dated 9th *September* 1706, and the Charter " following thereon in 1713; but always, with and under the " Conditions, Proviſions, and Irritancies contained in the ſaid " Bond of Tailzie and Charter, which are there holden as expreſ- " ſed, and appointed to be ſpecially repeated and expreſſed in the " Reſignations, Charters and Infeftments to follow thereon."

Your Lordſhips will obſerve, that this Settlement is preciſely in terms of the Contract of Marriage betwixt Sir *Peter Halket*

ket and his Lady, except that it passes over their eldest Son, who then appeared to be an irrecoverable Idiot.

Of the same Date, Sir *Peter Halket* executed a Bond of Annuity of 100 *l. Sterling* yearly, payable to Lady *Emilia*, his Wife, and, after her Death, to certain other Trustees, for the Use and Behoof of his eldest Son, *Peter*, during all the Days of his Life, upon the following Narrative: "That he "had, with Regret and due Concern, observed *Peter Halket*, "his eldest Son, had, from his Infancy, discovered many "Symptoms of Weakness of Mind andGenius; and now, that "he is arrived at the full Age and Stature of a Man, he con- "tinues still, on every Occasion, to betray that Weakness of "Mind and Judgment, and such an obvious Defect of Intel- "lectual Faculties and Understanding, that he may be deemed, "in the Sense of Law, a fatuous Person, nowise fit or capable, "either to manage an Estate, or to marry, whereby the "leaving him to succeed to his Lands and Estate, would be "highly imprudent, and might expose both him and it to "be a Prey to avaricious and designing Persons." 14 Octob. 1751.

Some Years after executing these Deeds, Sir *Peter Halket* went to *America* with his Regiment, and died in Battle in the Year 1755, by which the Succession of his Estate of *Pitfirran* opened to Major *Francis Halket*, his second Son, in terms of the Settlement 1751; and accordingly, he entered to the Possession of the Estate, and, of this Date, was served Heir of Provision in general to his Father under that Settlement; and, having executed the Procuratory, he obtained a Charter and Infestment under the Great Seal; and, as every Person interested in this Family, was perfectly satisfied of the Rationality and Justice of Sir *Peter*'s last Settlement, no Challenge was brought against it during the Life of *Francis*; and, if his Life had been spared, no-body would have thought of vindicating the Right of the eldest Son. 20 June, 1759.

But *James* having died in the 1758, and *Francis* upon the 11th of *November* 1760, the Right of *Peter*, the eldest Son,

was for the firſt time taken under Conſideration; his Intereſt could not poſſibly be the Motive of challenging the laſt Settlement of his Father; he was confeſſedly an Idiot, and 100 *l.* *per annum*, ſecured for his Aliment upon the Eſtate, was more than ſufficient for the comfortable Support of his animal Life.

Captain *John Wedderburn* of *Gosford*, the eldeſt Son of *Charles*, is the neareſt Heir to the Eſtate of *Pitfirran*, under the laſt Settlement of Sir *Peter Halket*, and in whom the two Eſtates of *Pitfirran* and *Gosford* would be conjoined; but he did not incline to make his Election, which of them he would take, in terms of all the Settlements of both Eſtates; he chooſed rather to hold his own Eſtate of *Gosford*, and to take the Adminiſtration of the Eſtate of *Pitfirran*, in the Name of his Couſin, the Idiot, with the certain Proſpect of ſucceeding to that Eſtate upon his Death.

For this Purpoſe he took out a Brieve from Chancery, and, upon a very clear Proof, obtained an unanimous Verdict, whereby the Inqueſt "cognoſced, ſerved, and declared the "ſaid Sir *Peter Halket*, *incompos mentis*, fatuous, and a natural I-"diot, and that he has been ſo from his Infancy, and that "the ſaid *John Wedderburn* is his neareſt Agnat;" and, upon this Service, Mr. *Wedderburn* obtained a Letter of Tutory from the Chancery, for governing the Perſon, and adminiſtrating the Eſtate of the Idiot, *donec Deus, clementia ſua, ſibi morte vel convaleſcentia providebit.*

20 Feb. 1761.

Upon this Title, Mr. *Wedderburn* brought a Proceſs of Reduction, in the Name of the Idiot, and of himſelf, as his Curator, for reducing, and ſetting aſide the Procuratory of Reſignation and Tailzie of the Eſtate of *Pitfirren*, executed by the late Sir *Peter* in the 1751, whereby he paſt over his eldeſt Son, the Idiot, and provided the Eſtate to *Francis*, his ſecond Son, as contrary to the Proviſion of Succeſſion and Limitations, contained in the original Tailzie 1706.

All the Subſtitutes, under the late Sir *Peter*'s Settlement, were made Parties to this Action; but, *Henry Wedderburn*, the

the younger Brother of Captain *Wedderburn* of *Gosford*, was more immediately intereſted in the Defence againſt this Action, becauſe the Devolution of one or other of theſe Eſtates, in caſe both of them ſhall now be found to be united in the Perſon of his elder Brother, muſt firſt operate in his favour; but he being abroad in the *Eaſt-Indies*, ignorant of the Action, and not having Time to authorize any Perſon to compear on his behalf, the Defence was taken up, aud pleaded in the Name of *Alexander Wedderburn* of *St. Germans*, a remoter Subſtitute, under the Settlement now brought under Challenge.

The Cauſe was argued in your Lordſhips Preſence in the End of laſt Seſſion; and, as it appeared to be a Caſe of Importance and Difficulty, you ordained both Parties to give in Informations againſt the Beginning of this Seſſion, which was accordingly done; and, upon adviſing theſe Informations, your Lordſhips, of this Date, pronounced the following Interlocutor: 27 Nov. 1761.

" Upon Report of the Lord Preſident, and having adviſed " the Informations given in *hinc inde*, the Lords ſuſtain the " Reaſons of Reduction of the Procuratory of Reſignation " and Tailzie, made by the late Colonel Sir *Peter Halket*, " dated the 14th Day of *October* 1751 Years, with the Char- " ter and Infeftment following thereon, and reduce, decern, " and declare accordingly."

The Petitioner thinks it his Duty to ſubmit this Caſe to your Lordſhips Review; and, from what paſſed in your own Deliberation upon the Cauſe, he hopes it will appear to merit ſuch Review.

For this Purpoſe, he will firſt ſtate the Principles of Law, and of ſound Reaſon, which appear to him ſufficient to ſupport the Deed of the late Sir *Peter Halket*; and, 2*dly*, will endeavour to obviate the Arguments which ſeemed to have moſt Weight with your Lordſhips for reducing that Deed.

And,

And, in the *firſt place*, from the Evidence above ſtated, your Lordſhips have the State and Condition of Sir *Peter Halket*, the Purſuer, clearly aſcertained and proved, you have the melancholy Teſtimony of his own Father, who had attended to the whole Progreſs of his Diſorder, from his firſt coming into Life, " that after arriving to the full Age and " Stature of a Man, he betrayed ſuch Weakneſs of Mind, " and Defect of intellectual Faculties, as appeared ſufficient " to him to denote him a fatuous Perſon."

2dly, At the Diſtance of ten Years thereafter, and after he has paſſed that Period of Life, when the Mind makes the moſt vigorous Efforts of all its Faculties, you have the unanimous Verdict of an Inqueſt, finding, " That he was *incompos* " *mentis*, fatuous, and a natural Idiot, and that he has been " ſo from his Infancy." And it is not ſo much as pretended, that there is the leaſt Symptom or Appearance, which can give the moſt diſtant Hope of his ever being endued with the Light of Reaſon, that great Principle of the Soul, which diſtinguiſhes a Man from the brute Creation.

Far be it from the Petitioners, to preſcribe Limits to the Divine Omnipotence; but this they may ſay, and they believe to your Lordſhips entire Satisfaction, that, according to the ordinary Courſe of Nature, there is no Poſſibility, *humanly ſpeaking*, of this Purſuer's ever becoming a Man, that is, a rational Being.

This being the Caſe, none of your Lordſhips can entertain the leaſt Doubt of the Rationality and Juſtice of the late Sir *Peter Halket*'s Settlement, by which he paſſed over his eldeſt Son, and deferred his Succeſſion to his ſecond Son, and other Subſtitutes, called by the former Settlements of his Eſtate.

It is a fixed Principle in the Law of *Scotland*, and upon which many important Judgments of this Court, and of the Houſe of Peers, have paſſed, that Entails, which limit the Exerciſe and Tranſmiſſion of Property, are *ſtricti juris*, *quoad* Creditors and Purchaſers. The publick Intereſt requires, that third

third Parties ſhould be ſecured againſt every Extenſion of the Limitations and Prohibitions of an Entail, and no Argument from the Intention of the Maker, will ſupport ſuch Extenſion beyond the expreſs Words of the Deed: But in all Queſtions concerning the Right of the Heirs called to the Succeſſion, or the Devolution of the Eſtate from one Heir to another, upon the Events and Conditions ſpecified in the Deed, a very different Rule of Interpretation takes place. The Publick has no Intereſt what Way the Succeſſion ſhall go; and every Queſtion among the Heirs, reſolves into a *quæſtio voluntatis*, which muſt be determined by the ſame Rules of Interpretation which apply to every other Settlement of Succeſſion.

It is alſo a general Rule in the Conſtruction of all Deeds of Settlement, *quod voluntas teſtatoris eſt ſuprema lex:* and where any Dubiety occurs concerning the *Will* of the Defunct, that Interpretation is to be received, which is moſt agreeable *to the Intent and Purpoſe of the Maker*.

The ſame Rule occurs in the Interpretation of Laws, and is juſtly applied from thence to Settlements of Succeſſion; for theſe are *quaſi privatæ leges ſucceſſionis*, and are to be interpreted by the ſame Rules, as the Will of the Lawgiver in publick Laws.—*Scire leges, non hoc eſt, verba earum tenere, ſed vim ac poteſtatem.—Benignius leges intrepretandæ, quo voluntas earum conſervetur.—In ambigua voce legis, ea potius accipienda eſt, ſignificatio quæ vitio caret; præſertim cum etiam voluntas legis ex hoc colligi poſſit*, C. 19. ff. de legibus.—*In ambiguis orationibus, maxime ſententia ſpectanda ejus qui eas protuliſſet*, l. 96. de reg. juris.—*Contra legem facit, qui id facit quod lex prohibet; in fraudem vero qui, ſalvis verbis legis, ſententiam ejus circumvenit: fraus enim legi fit, ubi quod fieri noluit, fieri autem non vetuit, id fit*, l. 29 et 30. ff. de legibus.—*Non dubium eſt, in legem committere eum, qui verba legis amplexus, contra legis nititur voluntatem: nec pœnas inſertas legibus evitabit, qui ſe, contra juris ſententiam, ſalva prærogativa verborum, fraudulenter excuſat*, l. 5. Cod. de leg.

Your Lordſhips had occaſion to apply theſe Rules of Interpretation in two late Caſes concerning the Devolution of the Eſtate of *Balnagown*, firſt, in the Queſtion betwixt Colonel *Roſs* and Sir *Alexander Gilmour*, and afterwards, in the like Queſtion betwixt Captain *Roſs* and Mr. *Ramſay*. And although, it appeared that the ſtrict Letter of the Words would have carried the Eſtate, in the firſt Caſe, to Sir *Alexander Gilmour*, and in the ſecond Caſe, to Mr. *Ramſay*, yet your Lordſhips thought yourſelves bound in both Caſes to explain the Will of the Maker of the Entail according to the general Plan, Intent and Purpoſe of the whole Deed.

In order to apply theſe Obſervations to the preſent Caſe, your Lordſhips will conſider what was the Plan, the Intent and Purpoſe of Dame *Janet Halket* and her Huſband, in the Deeds of Tailzie executed by them of their ſeveral Eſtates. It was no other than to preſerve in their common Iſſue an honourable Repreſentation of their Names and Families ſeparate and diſtinct from one another. For this Purpoſe they annexed certain Deſcriptions to the Heirs called by them to their reſpective Succeſſions, which clearly denote what they meant and intended thereby.

They require that the Heirs ſucceeding to them ſhould aſſume and conſtantly bear the Name and Arms of their reſpective Families; and, in caſe both Eſtates ſhould unite in one Perſon, they give to that Perſon a certain Time to make his Election which of the Eſtates he will take. Theſe Acts ſuppoſe a *Will and a Capacity of judging* in the ſeveral Heirs called to the Succeſſion of theſe Eſtates, and ſo far characteriſes the Perſons intended by the Makers of the Entail to repreſent them in their ſeveral Eſtates. But as theſe Characters cannot apply to an Idiot, conſequently it could not be the Will or Intention of the Makers of theſe Entails, that ſuch a Perſon ſhould ſucceed to either of their Eſtates. And your Lordſhips cannot entertain the leaſt Doubt, that if the Queſtion could be put to the Makers of theſe Entails, Whether they

they intended to fetter and limit the Heirs of Entail in ſuch a Manner, as that it ſhould not be in the Power of a Father to divert the Succeſſion from falling upon his eldeſt Son, an Idiot, and to make it paſs over to his ſecond Son? they both would have anſwered, that they had no ſuch Intention.

2dly, Your Lordſhips will conſider, that in theſe mutual Settlements betwixt a Huſband and Wife, whether before or after Marriage, the great Object of the Parties is not ſo much to provide and ſecure the Succeſſion to any particular Heir, but to provide and ſecure it to the Family and Line of Repreſentation which has been choſen by the Parties. If from juſt and neceſſary Cauſes the Succeſſion is diverted from one Branch of the Family to another, the Plan and Intention of the Makers is not thereby invaded. Thus it is provided, by both the Entails in queſtion, that if any of the Heirs of Tailzie ſhall fail to bear the Name and Arms of the Family, to whoſe Eſtate they ſucceed; or if the Huſbands of the Heirs-female ſhall fail to bear the Name and Arms, the Contraveeners ſhall forfeit, not only for themſelves, but alſo for the Heirs of their Bodies. This ſhows that it was noways inconſiſtent with the Plan of the Makers of theſe Entails, to forfeit or paſs over a particular Heir or Branch of the Entail, providing the Line of Succeſſion in the Family was preſerved.

At the ſame time, the Petitioner admits, that as the Makers of theſe Entails did not ſpecially provide for the unfortunate Event which has happened in their Family, the Succeſſion to the Eſtate of *Pitfirren* being provided to the late Sir *Peter Halket*, the eldeſt Son of the Marriage, *and his Heirs-male*, conſequently, the Succeſſion behoved to have devolved upon this Purſuer, the eldeſt Son of Sir *Peter*, though an Idiot, if that Succeſſion had not been legally altered. And the only Queſtion before your Lordſhips is, Whether Sir *Peter Halket*, the Father, being veſted and ſeaſed in the Fee of the Eſtate, under the Entail 1706, had ſufficient legal

Powers

Powers to paſs over his Son, the Idiot, and to tranſmit the Eſtate directly to his ſecond Son, and the other Subſtitutes of the Tailzie. And in conſtructing theſe Powers, the Petitioner apprehends your Lordſhips will apply the above Rules of Interpretation, ſtated from the Law, and will not follow a literal Conſtruction of the Limitations in the Entail, if it ſhall appear to your Lordſhips contrary to the whole Plan, Purpoſe and Intent of the Makers, in the Settlements of both theſe Eſtates.

Where the Maker of an Entail ties down his Succeſſion to a Series of Heirs, and ſo limits the Fee in each Heir, as to eave them no Power whatever over the Eſtate, ſo that they can neither aliene nor contract Debts, it may be difficult to ind a Remedy for ſuch an Event, as has occurred in the preſent Caſe, and it was juſtly ſaid, that they muſt take ſuch Heirs as Providence is pleaſed to give them. But where the Proprietor of an Eſtate veſts the Fee and full Right of Property in each of his Heirs, with no other Limitation, but that they ſhall not fraudulently diſappoint the Succeſſion, the Caſe will appear to merit a very different Conſideration.

The Words of the Prohibition in this Entail are: " That " it ſhall not be lieſome nor lawful to the ſaid *Peter Wedder-* " *burn*, or any of the remanent Heirs of Tailzie above writ- " ten, to do any Fact or Deed, directly nor indirectly, in " any ſort, whereby to alter, infringe or innovate this preſent " Tailzie, in the Order of Succeſſion, under the Proviſions " and Conditions above ſpecified, declaring all ſuch Facts and " Deeds void and null, and that the Contraveener, for him- " ſelf and the Heirs of his Body, ſhall forfeit all Right to " the Eſtate, which ſhall devolve to the next Subſtitute of " Entail, *but Prejudice to the ſaid* Peter Wedderburn, *and haill* " *remanent Heirs of Entail, of the Fee, full Right and Property* " *of the ſaid Eſtate, whereby it ſhall be lawful to them to ſell* " *and annailzie the ſame, or any Part thereof, for onerous Cauſes,* " *and thereupon to contract Debts and grant Securities therefor;*

" and

" and all other *Facts and Deeds, to do, uſe and exerce thereanent,* " *at their Pleaſure,* PROVIDING *the ſame be not done gratui-* " *touſly, or of Deſign and Intention to fruſtrate this preſent* " *Tailzie* and Deſtination, in the Order of Succeſſion above " written, or the Conditions above ſpecified, adjected thereto " in any ſort. HEREBY DECLARING, that it ſhall be law- " ful to the next immediate Heir to quarrel and reduce any " ſuch Deeds *made gratuitouſly, or of Deſign to fruſtrate,* as " ſaid is; which being ſo found and declared, ſhall infer a " Contravent'on againſt the Granter, and the Heirs of his " Body, *&c.*'

Upon reconſidering this Clauſe, the Petitioner hopes that your Lordſhips, as a ſovereign Court of Law and Equity, will not conſtruct the Deed of Settlement, executed by the late Sir *Peter Halket*, as a gratuitous or fraudulent Contravention of the Will of the Makers of the Entail, but as a rational and juſt Exerciſe of his Fee and Property, in order to anſwer the Plan and Purpoſe of their Settlements.

For with what Reaſon or Juſtice can it be ſaid, that his paſſing by his eldeſt Son, an Idiot, was done *gratuitouſly, or with Deſign and Intention to fruſtrate the Order of Succeſſion eſtabliſhed by the Makers of the Entail,* when it is certain, that they could never intend to ſecure the Succeſſion to ſuch an Heir. The Heirs which they deſcribe, and to whom they intended to ſecure the Succeſſion, were ſuch as ſhould be endowed with Reaſon, capable of Choice and Election, and of executing legal Acts. Where this Deſcription ſo entirely failed, as in the Caſe of a natural Idiot, it was no gratuitous or fraudulent Alteration of the Will of the Maker, to paſs the Succeſſion from him to the next Heir; on the contrary, it was a rational and juſt Exerciſe of the Right of Fee and Property, veſted in the late Sir *Peter*, for anſwering the evident Purpoſe and Intent of his Mother's Settlement.

2*dly*, In ſupport of this Conſtruction it will be conſidered, that Sir *Peter*'s Powers over this Eſtate were of ſo extenſive a

Nature, that he could have ſold it, or contracted Debts upon it, to the greateſt Extent; and, in ſhort, ſpent and diſſipated the Eſtate, or the Produce thereof, at his Pleaſure. Now, is it poſſible to conceive, that his Parents could mean or intend to give him ſuch an abſolute Power over the Eſtate, as that he could have put an End to the whole Tailzie and Succeſſion, by the moſt thoughtleſs and irrational Diſſipation, and yet to tie up his Hands in ſuch a Manner, as that he could not divert the Succeſſion from one Son, upon the moſt rational, weighty, and urgent Cauſe, that can poſſibly occur? It is ſcarce poſſible to ſuppoſe, that this could be the Will and Intention of the Makers of this Entail; and if it was not, the Petitioners cannot, with great Submiſſion, perceive how it can be argued, that the Deed executed by the late Sir *Peter Halket*, paſſing by his eldeſt Son, *was done gratuitouſly, and of Deſign and Intention to fruſtrate the Tailzie* and Deſtination of the Order of Succeſſion appointed by his Mother. When ſuch ample Powers were veſted in him by the Will of the Proprietor, it ſeems inconſiſtent with Reaſon and Juſtice to lay hold of the ſtrict Words of the Prohibition, *et ita captare verba*, as to reſtrain the Exerciſe of theſe Powers, in an Inſtance moſt rational and juſt in itſelf, and moſt conſiſtent with the Will and Intention of the Maker.

But, 3*dly*, It further appears, that the Makers of this Entail have given to each of the Heirs very ſtrong Powers with reſpect to their own Iſſue; for by every Act of Contravention they forfeit their Right to the Eſtate from all the Heirs deſcended of their own Body. Now, it ſeems inconſiſtent with Reaſon, that the late Sir *Peter Halket*, and each of the Heirs of Entail, ſhould have had it in their Power to have forfeited their whole Iſſue, however deſerving, and yet to have been ſo tied up, as that they could not paſs over one of their Iſſue, whom Nature had rendered abſolutely incapable of anſwering the Purpoſes of the Tailzie, or of deriving any Benefit from it, beyond the comfortable Suſtentation of his animal Life.

Although

Although there is no Deciſion of the Court directly applicable to the preſent Caſe, yet there are Deciſions from which a very ſtrong Analogy lies to the preſent Caſe. It is held, in the Law of *Scotland*, that a Proviſion of Lands to the Heirs-male of a Marriage, is an onerous Proviſion, and implies an Obligation upon the Father, from his own Covenant, *to do no gratuitous Deed in defraud or prejudice of the Proviſion*, and yet your Lordſhips found, that where the eldeſt Son, the Heir-male of the Marriage, and the undoubted Creditor in the Proviſion, appeared to be *a weak, fooliſh, and extravagant Perſon*, the Father had Power to paſs over the eldeſt Son, and to ſettle the Eſtate upon the ſecond Son of the Marriage, 10th *July* 1724, *James Douglas* contra *John Douglas* of *Tilliewhilly*.

It is true, that ſome Doubt has been entertained of the Juſtice of this Deciſion, becauſe of the Inſufficiency of the Reaſon aſſigned for the Exheredation of the eldeſt Son, which reſted upon ſuch a Character of the eldeſt Son, as would render the Deciſions of the Court, in the like Caſes, very arbitrary. But the Petitioner apprehends, that in ſuch a Caſe as the preſent, where the eldeſt Son of the Marriage was an abſolute Idiot, the Court would have no Heſitation in ſuſtaining the Father's Deed in favours of his ſecond Son.

The Petitioner cannot perceive any ſolid Ground for a Diſtinction betwixt the Caſe of an Eſtate provided by a Marriage-contract to the Heirs-male of the Marriage, and the Caſe of a Deſtination to Heirs-male, under a Prohibition upon the Heirs, *to do no gratuitous Deed, of Deſign and Intention to fruſtrate the Order of Succeſſion*, leaving to theſe Heirs every other Exerciſe of Fee and Property over the Eſtate. The implied Prohibition upon the Father, in the one Caſe, to do no gratuitous Deed, of Deſign or Intention to fruſtrate the Heirs-male of the Marriage, of their Succeſſion, is as ſtrong in Law as the expreſs Prohibition upon the Heirs in the other Caſe, with this Difference, that a Prohibition laid by the Proprietor of an Eſtate, upon his Heirs, can never have a ſtronger Effect than a Prohibition which he impoſes upon himſelf, by his

own

own onerous Deed and Covenant; on the contrary, it is the Genius of the Law to mitigate the Severity of ſuch Fetters impoſed upon Heirs, whereas no Man is intitled to ſuch Mitigation, againſt his own Obligation and Covenant.

Another Deciſion of the like Nature occurred very lately in the Caſe of *Robert Maxwell*, againſt Sir *Thomas Maxwell* of *Orchardtown*, where Sir *Robert Maxwell*, by his Contract of Marriage with *Anne Lindſay*, having provided all Lands he ſhould conqueiſs or acquire, or ſucceed to, to *Anne Lindſay* in Liferent, and to the Heirs to be procreated of her Body in Fee; and *Mungo Maxwell*, the eldeſt Son procreated betwixt him and his ſaid Wife, being a Papiſt, Sir *Robert*, the Father, did, upon that account, execute a Settlement of the Lands falling under the Proviſion of the Marriage-contract, by which he paſſed over *Mungo* the Papiſt, and veſted the Eſtate in Truſtees, for Behoof of his Iſſue *naſcituri*; and your Lordſhips ſuſtained this Settlement. And the Petitioner, without Argument, ſubmits it to your Lordſhips, if the Reaſon aſſigned by the late Sir *Peter Halket*, for paſſing over his eldeſt Son, and conveying the Eſtate to his ſecond Son, was not much ſtronger than occurred in that Caſe.

But to return to the Argument ariſing from the Import and juſt Conſtruction of the Entail in queſtion, the Petitioner begs leave to obſerve, in the *4th place*, that if the late Sir *Peter Halket* were ſtill alive, it is certain that his eldeſt Son could not have challenged his Settlement made in the 1751, as a Contravention of the Tailzie; becauſe, if it was a Contravention, it forfeited the Right of all his Iſſue. The Challenge was only competent to Captain *Wedderburn*, the next Subſtitute of Entail; but as no Challenge was brought by him in the Lifetime of the late Sir *Peter*, nor againſt *Francis* his Son, though he made up his Titles, and poſſeſſed the Eſtate for ſeveral Years, under the Settlement 1751, it is inconceivable to the Petitioner, that now, upon the Death of *Francis*, Captain *Wedderburn* can bring this Challenge, in the Name of the eldeſt

eldeſt Son of Sir *Peter* ; for it does not appear, upon any Principle of Law, this Challenge can be now competent to the eldeſt Son, if it was not competent to him, in the Life of his Father, or of his Brother, *Francis*. If Sir *Peter*, the Father, had executed ſuch a Deed, and kept it by him till his Death, the eldeſt Son might have attempted to repudiate that Deed, and to have taken up the Succeſſion under the Tailzie 1706. But as the Settlement of Sir *Peter* was carried into Execution in the Perſon of *Francis*, the ſecond Son, and the Eſtate poſſeſſed by him for ſeveral Years after, it is difficult to conceive how the Right of Challenge can now be competent to the eldeſt Son, conſiſtently with the Terms of the Entail.

For it is thereby expreſly provided, " That the Contra-
" veener, and the Heirs of his Body, ſhall amit, loſe, and
" tyne the Lands and Eſtate, and the ſame ſhall, incontinent
" after the Contravention, fall, accreſce, and pertain to the
" next Subſtitute." If, therefore, the Settlement of the late Sir *Peter Halket*, in the 1751, was a Contravention of the prohibitory Clauſe againſt altering the Order of Succeſſion, and was carried into full Effect, by the Charter and Infeftment in the Perſon of *Francis*, the ſecond Son, it is evident, from the Terms of the Entail, that the eldeſt Son had no Right to challenge that Contravention againſt his younger Brother, not only becauſe the Challenge is given to the next Subſtitute only, but becauſe, if it was a Contravention, it forfeited the eldeſt as well as the ſecond Son ; and if the eldeſt Son could not have challenged the Deed of Contravention, when ſtanding in full Force and Effect againſt him, in the Perſon of *Francis*, the Petitioners cannot conceive upon what Ground in Law that Challenge can now be competent to him ; for ſtill he is an Heir of the Contraveener's Body : And if the Deed 1751 is reduced as a Contravention of the Tailzie, it muſt have the Effect, according to the Will of the Tailzier, to carry over the Eſtate to Captain *Wedderburn*, the next Subſtitute of Entail, and it is to him alone that the Challenge is competent.

5thly, It appears, that the great Object of the two Entails of *Pitfirren* and *Gosford*, was to preſerve a diſtinct Repreſentation of theſe two Eſtates and Families in the ſeveral Heirs; and for this Purpoſe it is provided by both Entails, That, in caſe the two Eſtates ſhall be united in the Perſon of any of the Deſcendents of the Makers of the Entail, and there ſhall happen to be another Deſcendent of their Bodies then on Life, in that Caſe the Perſon, ſo ſucceeding to both Eſtates, ſhall be obliged to make his Election, and to denude of the other Eſtate in favours of the next Heir, being a Deſcendent of the Makers of the Entail, under this Proviſo, That it ſhall not be lawful to ſuch Heir, in whom both Eſtates ſhall unite, to burden or affect the Eſtate of which he is to denude, or his Succeſſor therein, with any Debts or Deeds contracted or done, after the Succeſſion of both Eſtates happens to devolve upon him, the next Subſtitute taking the leſſer Eſtate, being always obliged to relieve the Heir, ſo denuding, of all Debts and Deeds contracted or done by him before the Succeſſion to the larger Eſtate devolved to him.

When this Clauſe is attended to, your Lordſhips will perceive the Conſequences that will ariſe from your Interlocutor, as it now ſtands. If Mr. *Wedderburn* of *Gosford* had taken the Succeſſion as it opened to him, under the Settlement of the late Sir *Peter Halket*, and Charter and Infeftment of *Francis* following thereon, he behoved to have denuded of the Eſtate of *Gosford* to his younger Brother, ſubject to all the anterior Debts and Deeds contracted and done by him before the opening of the Succeſſion of the Eſtate of *Pitfirren*, whereby the Succeſſion and Repreſentation of both Families would have been preſerved to the reſpective Heirs, agreeable to the Will of the Makers of theſe Entails. But now, by your Lordſhips Interlocutor, Captain *Wedderburn* is intitled to hold his Eſtate of *Gosford*, and though abſolutely certain of ſucceeding to the Eſtate of *Pitfirren*, upon the Demiſe of the Idiot, and in the mean time intitled to the Poſſeſſion and Adminiſtration

Adminiſtration of the Eſtate in his Name, he has it in his Power, if he ſhall think fit, to exhauſt the Eſtate of *Gosford* by his after Debts and Deeds, and thereby diſappoint the Will and Intention of his Grandfather, with reſpect to the Repreſentation of the Family of *Gosford*, ſo that, under the Pretence of maintaining the Succeſſion of *Pitfirren* in the Perſon of one ſingle Heir, an Idiot, Captain *Wedderburn* will be enabled, if he is ſo minded, moſt effectually to diſappoint the whole Order of Succeſſion eſtabliſhed by his Grandfather, in the Eſtate of *Gosford*.

Upon all theſe Grounds, the Petitioner apprehends, that the Settlement of the late Sir *Peter Halket* in 1751, was no Contravention of the prohibitory Clauſe of the Entail 1706, againſt altering the Tailzie and Order of Succeſſion, but was a juſt and rational Exerciſe of the Fee and Property veſted in Sir *Peter*, according to the true Meaning and Intent of that Entail. And, 2*dly*, if it was a Contravention, as it was carried into Effect, and became the Title of *Francis*, the laſt Poſſeſſor of the Eſtate, that the Challenge is not competent to the Idiot, the eldeſt Son of Sir *Peter*, but to Captain *Wedderburn* of *Gosford* only, the next Subſtitute to the Contraveener, and the Heirs of his Body.

If what is above ſtated, ſhall appear to your Lordſhips to be founded in the ſolid and rational Conſtruction of the Deed of Entail, it will obviate the Arguments adduced for the Purſuers, in ſupport of their Conſtruction of the Entail, and will ſave Repetition upon that Head; and therefore, the Petitioners, as they propoſed, will now proceed to take notice of ſome extraneous Arguments, pleaded for the Purſuers, in ſupport of this Reduction.

In the *firſt* Place, it was ſaid, " That the Settlement 1751, " now under Challenge, not only exheredated the eldeſt " Son of the late Sir *Peter Halket*, but alſo contained ſundry " other Alterations, in the Order of Succeſſion, eſtabliſhed " by the Tailzie 1706, in ſo far as, by the Settlement 1751,

" Sir

" Sir *Peter* reſigns the Eſtate to *Francis*, his ſecond Son, and " the Heirs whatſoever of his Body; which failing, to *James* " his third Son, and the Heirs whatſoever of his Body, *&c.* " whereby he prefers the Daughters of *Francis*, to *James* and " his Heirs-male, though the Tailzie 1706 had preferred all " the Heirs-male of Sir *Peter*'s Body, in their Order, to the " Daughters or Heirs-female."

To this it is anſwered, *Firſt*, That the Settlement 1751, is preciſely in Terms of the Contract of Marriage, entered into by Sir *Peter Halket*, with Conſent of his Father, and Lady *Emilia Stewart*, his Wife; and the Petitioners apprehend, that an Alteration of this ſort, in behalf of the Heir-male of the Marriage, by which his Daughters were called to the Succeſſion, preferable to his younger Brothers, being made in a ſolemn Contract of Marriage, was not ſuch a *gratuitous* Alteration of the Order of Succeſſion, as that it could infer aContravention of the prohibitory Clauſe in the Tailzie 1706. It was certainly not ſo underſtood by the Parties, particularly by Sir *Peter Wedderburn*, who was a Party to the Entail 1706.

But, *2dly*, as no Iſſue now exiſts of this Marriage, except the Idiot, it is impoſſible that he can challenge the Contract of Marriage of his Father and Mother, which was ſo far from being prejudicial to him, that, on the contrary, it would have been highly beneficial to him, if he had been capable of having lawful Iſſue; neither can this Challenge be competent to the Heir of the Eſtate of *Gosford*, for all the Iſſue of that Marriage would have excluded him by the Entail 1706, and his own Grandfather, Sir *Peter Wedderburn*, who had full Powers over his Eſtate, was a Party Conſenter to that Contract.

The Purſuers did admit, what the Verdict of the Inqueſt proves, that the Purſuer is at this time an abſolute Idiot; but they were pleaſed to alledge, though without Evidence, " That in his Infancy he diſcovered ſome Symptoms of Rea- " ſon, and that he was taught to read and write; and that, " therefore, there is a Poſſibility he may reconvaleſce."

But,

But, the Petitioners apprehend, that, if the Facts, upon which that Reaſoning proceeds, are true, they rather found the oppoſite Concluſion: For it is certain, from Fact and Experience, that Perſons, who in their adult Years, do turn out natural Fools and Idiots, do ſometimes, in their younger Years, diſcover ſome ſmall Approaches to Reaſon and Underſtanding; but, when theſe feeble Efforts of Reaſon give way, at a time when Nature is moſt vigorous in her Exertions, and the melancholy State of Idiocy takes place, before the Perſon arrives at full Maturity, and continues for a long Courſe of Time, as in this Caſe, after full Maturity, the rational Faculties are thereby utterly extinguiſhed, without Hope or Poſſibility, in the ordinary Courſe of Nature, of an After-recovery.

The Purſuers farther inſiſted, " That even though he had " been a natural Fool and Idiot from the Womb, it will not " from thence follow, that his Convaleſcence is *impoſſible*; " the Preſumption may lie againſt his Convaleſcence, but he " ought not to be deprived of his Eſtate, upon a Preſumption " of his perpetual Incapacity, when the contrary may turn " out in the Event; and the Words of the Tutory were " quoted, *Donec Deus clementia ſua ſibi morte vel convaleſcentia* " *providebit.*"

But this has already been fully obviated. The Hiſtory of Mankind affords no Inſtance of ſuch an Idiot emerging into the Light of Reaſon and Underſtanding. This aſcertains the Courſe of Nature, and eſtabliſhes a *moral* and *legal* Impoſſibility, by which the Rights of Mankind may ſafely be judged and aſcertained. And the Clauſe of the Brieve are Words of Stile, very ſuitable and expreſſive, of our Dependence upon the Power of GOD, whatever Way it may be exerted.

It was farther ſaid, " That if the Settlement of the late Sir " *Peter Halket* in the 1751, ſhould be ſuſtained, Mr. *Wedder-* " *burn* of *Goſford* would be obliged to make his Election, " which of the Eſtates he would take, and to denude of the

" other in favours of his Brother; and, if this Purſuer ſhould " reconvaleſce, and recover the Eſtate of *Pitfirren* from Mr. " *Wedderburn*, this might involve Mr. *Wedderburn* in the Ha- " zard of loſing his own Eſtate of *Gosford*, becauſe his Bro- " ther, or any After-heir of Entail, might aliene or exhauſt " that Eſtate by Debts."

But the Poſſibility of this Event has already been obviated. And, *2dly*, Suppoſing it ſhould be ſuppoſed, what no Judge ought to ſuppoſe, that God Almighty may ſee fit to work a Miracle upon this Purſuer, by endowing him with Reaſon in ſome after Period of his Life, yet no Hazard can ariſe to Mr. *Wedderburn* of *Gosford*, by taking the Eſtate of *Pitfirren* under the laſt Inveſtiture in the Perſon of *Francis*; firſt, becauſe if ſuch a Miracle ſhould be ſuppoſed to be wrought upon the Idiot, it could not in Law intitle him to be reſtored to the Eſtate of *Pitfirren*; for if the Argument above pleaded ſhall appear to your Lordſhips to be ſolid, it muſt ſupport the Settlement of the late Sir *Peter Halket* abſolutely, and leave no place to this Purſuer, to be reſtored againſt it, upon ſuch an extraordinary Contingency as his Reconvaleſcence. The Acts and Deeds of Men muſt have their Effect in Law, according to the Facts and Circumſtances at the Time which gave occaſion to their Execution. This Purſuer was confeſſedly an Idiot at the Time his Father paſſed him over in the Succeſſion; and, in judging how far that Act was within the Powers of the Father, your Lordſhips will have no Regard to a Poſſibility of Reconvaleſcence, not in the Courſe of Nature, but by a Miracle from Heaven, and will therefore take the Caſe as it ſtood at the Time of the Father's Deed, and at the Time when the Challenge is brought againſt the Deed; and if you now aſſoilzie from that Challenge, this will give abſolute Security to Mr. *Wedderburn* of *Gosford* to take the Eſtate of *Pitfirren*, and to hold it againſt any Challenge which may afterwards be brought upon the ſuppoſed Reconvaleſcence of this Purſuer. And, *2dly*, as his Powers over the Eſtate of

Pitfirren

Pitfirren will be as great as the Powers of his younger Brother over the Eſtate of *Gosford*, in no Event can he be in danger of ſuffering by that Exchange.

It was further ſaid, " That the Law does not conſider mo-
" ral Improbabilities, or what uſually happens, but requires
" abſolute Certainty, to exclude People from their Rights.
" When a Sum is made payable upon the Failure of Heirs of
" the Body of a Man or a Woman, though the Man ſhould
" be ſeized with a Palſy which was judged incurable, or if the
" Woman ſhould live to the moſt advanced Age, ſo as, hu-
" manly ſpeaking, there could be no Proſpect of Iſſue, yet the
" Claim would not be competent during the Life of ei-
" ther."

But, with great Submiſſion, there is no Parallel betwixt the two Caſes. From Fact and Experience it is found, that the ordinary Diſeaſes of the human Body are of that Nature, that no certain Judgment can be formed whether the afflicted Perſon may reconvaleſce or not; and in like manner it is undetermined by the Courſe of Nature, what is the laſt Age of the Poſſibility of Iſſue, either in Man or Woman. It would be impoſſible for Courts of Law to enter into this Diſcuſſion upon every particular Caſe, and therefore the Law has wiſely determined, *præſumptione juris et de jure*, that the Poſſibility of Iſſue ſhall not be underſtood to ceaſe during the Life of Man or Woman. But how this applies to the preſent Caſe the Petitioners are at a loſs to perceive; for the Law has eſtabliſhed no ſuch Preſumption with regard to the Reconvaleſcence of a natural Fool or Idiot; and though ſuch Reconvaleſcence is poſſible by the extraordinary Power of God, yet this can have no Influence upon the preſent Argument; for the ſingle Queſtion before your Lordſhips is, Whether this Purſuer, being arrived to the Age of Man, and then, confeſſedly, a natural Fool or Idiot, his Father had Powers upon that Appearance, and notwithſtanding of the Poſſibility of his Reconvaleſence, by the extraordinary Power of God, to

paſs

paſs him over, and to defer the Succeſſion to his ſecond Son. And the Petitioners apprehend, that the bare Poſſibility of his Reconvaleſcence, upon which the Purſuer reſts ſo great a Part of his Argument, was an Event, which no rational Man could look for, and which your Lordſhips can pay no Regard to, in conſidering how far the Deed of Sir *Peter* was within his Powers, as Fiar and Proprietor of the Eſtate, according to a juſt and rational Conſtruction of the whole Deed.

" It was ſaid, that the Argument pleaded in ſupport of " this Deed, would equally apply to many other Caſes. Sup- " poſe the eldeſt Son of Sir *Peter* had been capable, and had " committed Treaſon, or had incurred Debts which would " have exhauſted the Eſtate, or if he had been of that weak " and prodigal Nature, as to have endangered the Eſtate by " his Succeſſion; in all theſe Caſes, the Argument would " have been the ſame for ſetting him aſide in the Suc- " ceſſion."

But the Petitioners apprehend, that there is no Parallel betwixt any of theſe Caſes and the preſent: For though he had committed Treaſon, he might have been reſtored without any extraordinary Interpoſition of Providence, and ſuch Things are common every Day. If he had been Bankrupt, by the ordinary Courſe of human Affairs, he might have recovered his Circumſtances, and preſerved the Eſtate, or might have pre-deceaſed, and left the Eſtate free to his Iſſue. And from the whole Tenor of the Entail, it appears not to have been the Intention of the Makers, to ſecure the Eſtate againſt the Debts of the Heirs, whether contracted before or after their Succeſſion. If he had appeared weak or prodigal, the ſame Obſervations will apply; and therefore none of theſe Caſes could have afforded the ſame Argument in ſupport of Sir *Peter*'s Settlement, as the Caſe now under Conſideration, where the eldeſt Son being a natural Fool and Idiot, without any other Poſſibility of his Reconvaleſcence, than by the Power of God operating out of the Courſe of Nature, ſo far as known to Mankind,

Mankind, was incapable of enjoying the Eſtate, further than what is provided for his Aliment, or of ſuſtaining that Repreſentation of the Family, which was intended by the Makers of the Entail, or of having lawful Iſſue, to whom he could tranſmit the Eſtate; and therefore, the Father, as every wiſe Man would have done in the like Circumſtances, paſſed him over as a Blank in the Succeſſion, and, in virtue of his Powers of Fee and Property in the Eſtates, conferred the Succeſſion upon his ſecond Son, and the other Subſtitutes of the Entail. And the Petitioners hope, that your Lordſhips will be of Opinion, that ſuch an Act was neither *gratuitous*, nor in Defraud of the Tailzie and Order of Succeſſion, but was a juſt and rational Exerciſe of the Father's Fee and Property in the Eſtate, ſupported by a Cauſe more weighty and onerous, than if he had ſold the Eſtate, and given it away in his Lifetime, in order to prevent his Succeſſion from devolving upon ſuch an Heir. This laſt he could have done without Challenge; and it is hoped, that upon conſidering the whole Deed, your Lordſhips will be of Opinion, that he had likeways Power to do the former.

MAY it therefore pleaſe your Lordſhips to alter your Interlocutor, and in reſpect of what is above ſet forth, to aſſoilzie from this Reduction.

According to Juſtice, *&c.*

THO. MILLER.